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Piedmont Environmental Council v. Federal Energy Regulatory Commission

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PIEDMONT ENVIRONMENTAL COUNCIL V. FEDERAL ENERGY REGULATORY COMMISSION

In *Piedmont Environmental Council v. Federal Energy Regulatory Commission*,¹ the United States Court of Appeals for the Fourth Circuit held that a statute allowing the Federal Energy Regulatory Commission (FERC) to issue permits for the construction of new electrical transmission facilities where state commissions have ““withheld approval [of a permit application] for more than 1 year”” does not apply in cases where the state authority simply denies a permit application.²

Until 2005, the electrical transmission systems distributing power throughout the United States were entirely a product of state regulation.³ In particular, state commissions exercised exclusive authority to issue permits for the siting and construction of new electrical transmission facilities.⁴ With the Energy Policy Act of 2005⁵ (EPAct), however, Congress empowered FERC to exercise “backstop” siting authority, allowing the federal government to supplement state regulators in issuing permits for new transmission infrastructure.⁶ The Act envisions a robust federal power—coupling its permitting authority with a right of eminent domain⁷—but limits its use to certain narrowly defined circumstances.⁸ Among those circumstances is the situation where a state has “withheld approval for more than 1 year.”⁹ The primary question presented in *Piedmont* was the precise scope of this authority.¹⁰

FERC issued a final rule on November 16, 2006,¹¹ as required by the EPAct,¹² in which it set forth its understanding of the scope of its backstop authority in the broadest possible terms.¹³ Under this interpretation, FERC’s power to award permits where a state has “withheld approval for more than 1

1. 558 F.3d 304 (4th Cir. 2009), *cert. denied sub nom.* Edison Elec. Inst. v. Piedmont Envtl. Council, No. 09-343, 2010 WL 154946 (U.S. Jan. 19, 2010).

2. *Id.* at 309–10 (alteration in original). This Summary will focus on the court’s core holding about the scope of FERC’s permitting jurisdiction, but the court also held that FERC “was not required to prepare an environmental assessment or an environmental impact statement” in issuing regulations governing the content of permit applications, that FERC should have consulted with the Council on Environmental Quality in issuing its National Environmental Policy Act (NEPA) implementing regulations for such permit applications, and that a challenge to the content of “FERC’s NEPA-implementing regulations” was accordingly unripe. *Id.* at 310.

3. *Id.*

4. *Id.*

5. Pub. L. No. 109-58, 119 Stat. 594 (2005).

6. *Piedmont*, 558 F.3d at 310 (citing 16 U.S.C. §§ 824p(a), 824p(b), 824p(b)(1)(C)(i) (2006)).

7. 16 U.S.C. § 824p(e)(1).

8. *See id.* § 824p(b).

9. *Id.* § 824p(b)(1)(C)(i).

10. *See Piedmont*, 558 F.3d at 309–10.

11. *Id.* at 311.

12. 16 U.S.C. § 824p(c)(2).

13. *See Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities*, 71 Fed. Reg. 69,440, 69,444–45 (Dec. 1, 2006).

year” includes not only cases where the state “fails to act,” but also where it “rejects” or “deni[es]” an application.¹⁴ In so concluding, FERC rejected input submitted by parties during the comment period that the phrase “withheld approval for more than 1 year” not be interpreted to confer jurisdiction where a state simply denies an application.¹⁵ One commissioner, Sudeen G. Kelly, penned a vigorous dissent to FERC’s final rule, arguing that by forcing states either to approve a permit or relinquish authority to the federal government, the announced rule amounted to “preemption” of state jurisdiction without an adequate basis in the statutory text.¹⁶

The four petitioners in *Piedmont*—Piedmont Environmental Council (Piedmont), the Public Service Commission of the State of New York, the Minnesota Public Utilities Commission, and Communities Against Regional Interconnect—each requested rehearing on the final rule, which FERC denied.¹⁷ Piedmont filed a petition for review in the Fourth Circuit.¹⁸ The remaining parties filed similar petitions in the Second Circuit and D.C. Circuit.¹⁹ The courts transferred their cases to the Fourth Circuit, and the cases were consolidated with Piedmont’s suit.²⁰

All three members of the Fourth Circuit panel agreed that the scope of FERC’s backstop authority was a matter of statutory interpretation to be determined with reference to *Chevron U.S.A., Inc. v. Natural Resources Defense Council*.²¹ The petitioners had argued for a more complex analysis, reasoning that because the EPCA intruded upon a realm of traditional state authority, the court should apply a presumption against preemption and require a clear statement of congressional intent to supplement state authority with overlapping federal jurisdiction.²² Judge Michael, writing for the majority, disagreed.²³ Where it is clear that Congress intended to intercede in an area of preexisting state regulation and the only question is the scope of that federal authority, then, according to Judge Michael, *New York v. Federal Energy Regulatory Commission*²⁴ requires the court to interpret the statute “without any presumption one way or the other” in order “to determine whether Congress has given [the

14. *Id.*

15. *Piedmont*, 558 F.3d at 310. Indeed, of the fifty-one letters received during the comment period, not one argued in favor of FERC’s expansive interpretation. Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities, 71 Fed. Reg. at 69,476 (Kelly, Comm’r, dissenting in part).

16. Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities, 71 Fed. Reg. at 69,476.

17. *Piedmont*, 558 F.3d at 311.

18. *Id.* at 312.

19. *Id.*

20. *Id.*

21. *Id.* (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)); *id.* at 321 (Traxler, J., dissenting).

22. *Id.*

23. *Id.*

24. 535 U.S. 1 (2002).

agency] the power to act as it has.”²⁵ Presented, then, with a straightforward task of reviewing an agency’s interpretation of law, Judge Michael invoked *Chevron*’s two-step inquiry: first, “whether Congress has directly spoken to the precise question at issue,” and second, if the statute is not clear, “whether the agency’s answer is based on a permissible construction of the statute.”²⁶

The majority held that FERC’s interpretation was “contrary to the plain meaning of the statute” and thus failed under the first step of *Chevron*.²⁷ Judge Michael embarked on a relatively searching inquiry at this first step, consulting not only “the language itself,” but also “the specific context in which that language is used, and the broader context of the statute as a whole.”²⁸

Relying on a *Webster’s Dictionary* definition of the term “withhold” and its context in the statute, Judge Michael reasoned that FERC’s interpretation did not fit the plain language of the statute.²⁹ The phrase “withheld approval for more than 1 year” implies the notion “that action has been held back *continuously* over a period of time.”³⁰ Denial, by contrast, “is a final act that stops the running of time during which approval was withheld on a pending application.”³¹ It would be “nonsensical,” then, to conceive of situations where a state has “*denied* approval . . . for more than 1 year” because “the final nature of ‘denied’ conflicts with the continuing nature of ‘for more than 1 year.’”³² Judge Michael acknowledged that both *Webster’s Dictionary* and *Roget’s International Thesaurus* suggest an alternative definition of “deny” is sometimes “withhold,” but he found that this did not make the terms interchangeable in the statute.³³ A denial may take many forms—including the withholding of approval—but that does not mean that every denial necessarily constitutes a withholding.³⁴

Judge Michael argued further that the broader statutory scheme indicated congressional intent to confer “only a measured, although important, transfer of jurisdiction to FERC.”³⁵ Critically, FERC’s backstop authority is limited to “a carefully drawn list of five circumstances,” which apply only where (1) the state regulator lacks authority to approve the siting, (2) the state regulator lacks authority to consider interstate benefits of the proposed facility, (3) the applicant cannot qualify for a permit under state law because the proposed facility “does

25. *Piedmont*, 558 F.3d at 312 (alteration in original) (quoting *New York*, 535 U.S. at 18) (internal quotation marks omitted).

26. *Id.* (quoting *Chevron*, 467 U.S. at 842–43) (internal quotation marks omitted).

27. *Id.* at 313–15.

28. *Id.* at 312–13 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)).

29. *Id.* at 313 (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2627 (2002)).

30. *Id.*

31. *Id.*

32. *Id.* (emphasis omitted).

33. *Id.* (citing WEBSTER’S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 603, 2627 (2002); ROGET’S INTERNATIONAL THESAURUS ¶ 776.4 (4th ed. 1984)).

34. *Id.* (“The word ‘deny’ is broad enough to include ‘withhold’ in its definition, but the word ‘withhold’ is not broad enough to include ‘deny’ in its definition.”).

35. *Id.* at 314.

not serve end-use customers in [the] state,” (4) the state regulator has withheld approval for more than one year (the provision at issue in *Piedmont*), or (5) the state regulator has approved the facility but imposed conditions that render it either economically infeasible or incapable of reducing transmission congestion in interstate commerce.³⁶ Setting aside the withholding of approval circumstance at issue in *Piedmont*, each of the other four circumstances represents a “limited grant[] of jurisdiction” intended to allow the federal government to step in “only when a state commission either is unable to act or acts inappropriately by including project-killing conditions.”³⁷ FERC’s interpretation of the “withheld approval” language, however, would make it “futile for a state commission to deny a permit based on traditional considerations like cost and benefit, land use and environmental impacts, and health and safety”—effectively constituting a broad preemption of state jurisdiction “completely out of proportion” with the other four circumstances.³⁸

The majority also addressed the clause in light of two potentially problematic provisions of the EPAct statutory scheme. First, the “withheld approval” language of 16 U.S.C. § 824p(b)(1)(C)(i) is paired with subsection (b)(1)(C)(ii), which confers federal jurisdiction in cases where the state regulator has “conditioned its approval in such a manner that the proposed construction or modification will not significantly reduce transmission congestion in interstate commerce or is not economically feasible.”³⁹ These two subsections should be read in a logically consistent way, but that raises the question of why Congress would provide a mechanism for FERC to overrule state regulatory authority in cases of overly onerous conditions but not of outright denial.⁴⁰ Judge Michael answered that “[w]hen a state commission grants approval with project-killing conditions, it misuses its authority, and the state licensing system has failed,” justifying FERC’s interposition of federal jurisdiction.⁴¹ When a state denies an application, by contrast, “it acts with transparency and engages in a legitimate use of its traditional powers.”⁴² The second important provision of the EPAct provides for three or more states to enter into interstate compacts for the purpose of regulating electricity transmission facilities; in addition, it forecloses FERC’s backstop authority over decisions by such interstate agencies unless two conditions are met: (1) “members of the compact are in disagreement” and (2) “the Secretary makes . . . the finding described in subsection (b)(1)(C)”⁴³—to wit, that the agency either has withheld approval for more than one year or else

36. *Id.* at 313–14 (citing 16 U.S.C. §§ 824p(1)(A)(i)–(ii), 824p(1)(B), 824p(1)(C)(i)–(ii) (2006)).

37. *Id.* at 314.

38. *Id.*

39. 16 U.S.C. § 824p(b)(1)(C)(ii).

40. *See Piedmont*, 558 F.3d at 314.

41. *Id.*

42. *Id.* at 314–15.

43. 16 U.S.C. § 824p(b)(1)(C).

conditioned approval on project-killing conditions.⁴⁴ As the dissent pointed out, this poses an important question of why Congress would carve out a special provision to shield the decisions of interstate compact agencies from federal jurisdiction if an individual state regulator could block that jurisdiction simply by denying an application.⁴⁵ Judge Michael responded that the interstate compact provision offers additional insulation to interstate agencies in a different way: if an interstate compact agency delays action on a project for more than one year or imposes project-killing conditions—unambiguously fulfilling subsection (b)(1)(C)—FERC still may not intercede unless the states comprising the interstate compact are in disagreement.⁴⁶

Judge Traxler, writing in dissent, contended that the plain meaning of “withheld approval for more than 1 year” includes denial of approval and thus that FERC’s interpretation should prevail at the first stage of the court’s *Chevron* inquiry.⁴⁷ Here Judge Traxler disputed both the majority’s reading of the plain language of the statute and its interpretation of the broader statutory scheme.⁴⁸ Alternatively, he argued that FERC’s interpretation is “reasonable at the very least, and therefore entitled to deference under *Chevron*.”⁴⁹

In terms of the statute’s plain meaning, Judge Traxler argued that a state has “withheld approval for more than 1 year” any time a full year elapses after approval is sought and “the state still has not granted it, regardless of the reason.”⁵⁰ Contrary to the majority’s analysis, he argued, the word “withhold” is not interchangeable with the word “denied” because denial of an application is not a legally consequential event under the statute.⁵¹ He explained that “denial does not *constitute* the withholding of approval” but rather is “merely one event that may occur during the more-than-one-year period in which approval is withheld.”⁵²

Judge Traxler also criticized the majority’s understanding of the broader statutory scheme embodied in EPCA’s various backstop authority provisions.⁵³ The notion that Congress meant to confer only certain “limited grants of jurisdiction,”⁵⁴ according to the dissent, is belied by the sweeping nature of subsection (b)(1)(C)(ii), which allows FERC “essentially [to] ‘trump’ the states’ permitting decisions . . . when a state grants a permit under conditions FERC determines to be unreasonable.”⁵⁵ In contrast to the majority’s relatively narrow

44. *Id.* §§ 824p(i)(1), (4).

45. *Piedmont*, 558 F.3d at 323–24 (Traxler, J., dissenting).

46. *Id.* at 315 n.2 (majority opinion).

47. *See id.* at 326 (Traxler, J., dissenting).

48. *See id.* at 321–25.

49. *Id.* at 326.

50. *Id.* at 322.

51. *See id.* at 322–23.

52. *Id.*

53. *See id.* at 323–25.

54. *Id.* at 314 (majority opinion).

55. *Id.* at 323 (Traxler, J., dissenting) (emphasis omitted).

reading, the dissent found that subsection (b)(1)(C)(ii)'s references to conditions that “will not significantly reduce transmission congestion” or that are “not economically feasible” allow FERC to overrule a state’s decision “based on simple differences of opinion between FERC and the state regarding the impact of the conditions imposed.”⁵⁶ Given the breadth of such power “to ‘trump’ states when they thwart the goal of significantly reducing transmission congestion . . . by granting permits subject to conditions FERC determines to be unreasonable,” Judge Traxler concluded that it “makes no sense . . . in light of the purpose of the legislation” to suppose that Congress meant to preserve state jurisdiction “when states thwart the same goal by denying the permits outright.”⁵⁷

Finally, Judge Traxler argued that the interstate compact provision of subsection (i) is incompatible with the majority’s holding.⁵⁸ If Congress had meant to allow a single state’s denial of an application to be final and to block FERC’s backstop authority—as the majority held—then it would make little sense to require multiple states in an interstate compact to be unanimous in denying an application in order to foreclose the federal jurisdiction.⁵⁹

Piedmont not only provides an example of a closely reasoned and relatively searching inquiry at the first stage of the *Chevron* analysis, but it also illustrates some of the difficulties in applying *Chevron*’s analytic framework. The linguistic arguments of both the majority opinion and the dissent fall short in ascertaining whether Congress has “directly spoken to the precise question at issue” and whether “the intent of Congress is clear.”⁶⁰ Rather, the two sides justify their views on the basis of competing conceptions of the statutory scheme that, in the end, seem to reflect policy judgments about the proper balance of federal and state authority to site electrical transmission facilities.

Judge Michael’s textual analysis addresses arguments made in FERC’s appellate brief⁶¹ but never engages with Judge Traxler’s contention that denial of an application is simply irrelevant to the question of whether a state has “withheld approval for more than 1 year.” The dissent envisions a binary conception of the meaning of “withhold”—that a state regulator either grants approval or withholds it⁶²—that seems faithful to the dictionary definition cited by the majority.⁶³ The dissent’s view is compelling on an intuitive level: if one heard that a state had decided not to withhold approval of a permit application,

56. *Id.* at 323–24 (citing 16 U.S.C. § 824p(b)(1)(C)(ii) (2006)).

57. *Id.*

58. *Id.* at 324 (citing 16 U.S.C. § 824p(i)).

59. *Id.*

60. *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842 (1984).

61. Brief of Respondent Federal Energy Regulatory Commission at 16–17, *Piedmont Envtl. Council v. FERC*, 558 F.3d 304 (4th Cir. 2009) (No. 07-1651) (arguing that “the term ‘deny’ is synonymous with ‘withhold’”).

62. *See Piedmont*, 558 F.3d at 322–23.

63. *Id.* at 313 (majority opinion) (defining “withhold” as “‘to desist or refrain from granting, giving, or allowing’” (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2627 (2002))).

one would assume that the state had approved the application instead; it would be difficult to conclude from such phrasing that the state, in fact, had denied the application. Moreover, Congress's choice of the words "withheld approval," rather than "withheld action" or "withheld decision," suggests that it contemplated a binary construct of approval or no approval, lending further support to Judge Traxler's reading of "withheld." The plain text of the statute thus either supports the dissent's view or, at best, is ambiguous: the fact that two judges "found that the relevant statutory text is clear, but in diametrically opposed directions," suggests a certain measure of ambiguity.⁶⁴ Given the weakness of the linguistic argument, then, the outcome of the case rests on competing visions of how the EPAct works as a whole.

Both sides focus on harmonizing their views of the "withheld approval" language with the structural scheme of the statute, but the dissent's reliance on the interstate compact provision,⁶⁵ in particular, is misplaced. Judge Traxler seems to have in mind one specific example: where an application is denied, either unanimously or with at least one member state in disagreement.⁶⁶ Under the majority's holding, a denial by an interstate compact agency does not trigger FERC's backstop authority, no matter what the voting posture.⁶⁷ For the dissent, this renders meaningless the requirement that "members of the compact [be] in disagreement" before FERC can exercise jurisdiction⁶⁸ and undermines any incentive for states to enter into such compacts.⁶⁹ Of course, as the majority points out, this line of argument ignores the other possible scenarios where a single state's action *would* trigger federal jurisdiction, but the same action taken by an interstate compact agency, acting on the unanimous consent of its member states, would *not* trigger federal jurisdiction: either where no action at all is taken for more than one year or where approval is granted but tied to project-killing conditions.⁷⁰

The lynchpin of the case is thus the relationship between subsections (b)(1)(C)(i) and (ii). For Judge Michael's majority, subsection (ii) confers a relatively narrow basis for federal jurisdiction—available only where a state regulator "misuses its authority" in imposing "project-killing" conditions.⁷¹ Given the narrowness of these circumstances, the majority reasons, it makes

64. Debbie Swanstrom & Meredith M. Jolivet, *Doe Transmission Corridor Designations & FERC Backstop Siting Authority: Has the Energy Policy Act of 2005 Succeeded in Stimulating the Development of New Transmission Facilities?*, 30 ENERGY L.J. 415, 450 (2009) (quoting Petition of Respondent Federal Energy Regulatory Commission for Rehearing En Banc, *Piedmont*, 558 F.3d 304 (No. 07-1651)) (internal quotation marks omitted).

65. *See Piedmont*, 558 F.3d at 324 (Traxler, J., dissenting).

66. *See id.*

67. *Id.* at 315 n.2 (majority opinion).

68. 16 U.S.C. § 824p(i)(4) (2006).

69. *See Piedmont*, 558 F.3d at 324 (Traxler, J., dissenting).

70. *Id.* at 315 n.2 (majority opinion).

71. *Id.* at 314. The majority contrasted this with outright denial, which is a "legitimate use of [a state's] traditional powers." *Id.* at 315.

little sense to read subsection (i) so broadly as to confer federal jurisdiction every time a state denies a permit application.⁷² The implication seems to be that it triggers federal jurisdiction only in the relatively rare situations where a state misuses its authority; the federal government merely stands in reserve as a guarantor of “transparency” and “legitima[cy]” in the state regulatory process.⁷³

But the same formulation might be turned on its head: if a state imposes conditions that “will not significantly reduce transmission congestion” or are “not economically feasible,”⁷⁴ then, by definition, the state has misused its authority—a notion that paradoxically seems to narrow the range of discretion a state may legitimately exercise. In the end, though, Judge Michael seems to conceive of the EPAct as an action-forcing mechanism, prodding states to take action in a timely and reasonable manner, but reserving the bulk of regulatory authority to the states.

For Judge Traxler, by contrast, subsection (ii) confers very broad discretion: FERC may exercise its backstop authority on the basis of a mere policy disagreement with a state over the practical or economic effects of an approval condition. This interpretation rested on a vision of the statutory scheme as a mechanism not so much to fine-tune the state regulatory process as to supplant it, telling states, in the words of Commissioner Kelly, “[e]ither issue a permit, or we’ll do it for them.”⁷⁵ Judge Traxler emphasized the advantages of FERC’s “broader national perspective” in making permit decisions and the importance of preventing states from “frustrat[ing] the goal of significantly reducing transmission congestion,”⁷⁶ indicating a vision of federal authority as qualitatively different from state authority, motivated by a more catholic concern for the needs of an interconnected electricity distribution system. FERC’s authority thus overlaps with the legitimate authority of the states in the context of subsection (ii); accordingly, it makes sense for FERC’s authority to overlap with that of the states in the context of subsection (i) as well.⁷⁷

Piedmont illustrates the problem of resolving a case like this under the *Chevron* framework. Both the majority’s and the dissent’s visions of the purposes of the statute—with federal authority either carefully counterbalancing the authority of the states or else partially overlapping it—are internally coherent and offer acceptable interpretations of the overall statutory scheme. The argument ultimately boils down to competing views of what Congress intended the balance between the federal government and states to be, but the

72. *Id.* at 314.

73. *See id.* at 314–15.

74. *Id.* (citing 16 U.S.C. § 824p(b)(1)(C)(ii) (2006)).

75. Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities, 71 Fed. Reg. 69,440, 69,476 (Dec. 1, 2006) (Kelly, Comm’r, dissenting in part).

76. *Piedmont*, 558 F.3d at 323–24 (Traxler, J., dissenting).

77. *See id.*

susceptibility of the statutory framework to differing interpretations stands in tension with the idea that “the intent of Congress is clear.”⁷⁸

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78. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

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